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Supreme Court of the United States

EDMUND BURKE,
Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, *et al.*,
Appellees.
No. 279

SUPPLEMENTAL BRIEF OF APPELLANT EDMUND BURKE

RELATING TO SEVENTH CERTIFIED QUESTION.

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Attorney in Pro. Per.

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Supreme Court of the United States

EDMUND BURKE,
Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY *et al.*,
Appellees.
No. 682.

SUPPLEMENTAL BRIEF OF APPELLANT EDMUND BURKE,

Attorney in Pro. Per.

This supplemental brief will be devoted to the dual questions, namely, the legal effect of the acceptance by the Southern Pacific Railroad Company of a patent containing an exception of *all mineral lands,* known and unknown inserted in the patent pursuant to the agreement of the defendant railroad company and the United States.

I.

The contention of appellant is that the exception in the patent of all mineral lands included known and unknown mineral lands.

(A) That such exception, in the granting Act of July 27, 1866, covered and included known and unknown mineral lands was definitely settled by this Court in the *Barden* case.

(B) That such an exception in the patent, in any event, but gives expression to the intent of the Statute is obvious.

(C) Viewing the lands granted in the Act of July 27, 1866, as a gift to the Southern Pacific Railroad Company, it is obvious that it remained with the United States to determine the quantity and quality of the gift.

(D) Viewing the same grant (and patent) as a contract, it is equally obvious that it was a legal right for the contracting parties to agree on and to determine the quality of the land that should be included in the grant and to agree and to bind each other as to the quality of such land, by the insertion of the mineral exception, and to insert such terms of description and of conveyance as might be agreed on or which would carry into effect the *intent* of the granting statute.

(E) Now and at the time of the grant of July 27, 1866, and at the time of the patent, July 10, 1894, it was the law, and the settled policy of the United States, that no mineral land should be acquired from the United States by the railroad land grant companies, and the grant or gift was made by the United States and accepted by the defendant railroad company in full light of such law and policy.

(F) From the date of the grant in question, and prior thereto, and down to the time of the *ex parte* ruling of Secretary Hitchcock in 1904, it was the policy of the law, and the sole practice of the land department, in construing such grants, to include in the patents, issuing thereunder, a mineral exception of known and unknown mineral lands and such patents covered many millions of acres of lands.

(G) From the date of the grant the defendant railroad never expressed an objection to such policy and practice on part of the United States, *but, without objection or dissent accepted* the same and recorded such patents in various Counties of California and acted under the same for many years.

(H) That, until at least the ruling of Secretary Hitchcock in 1904, it was the practice of the defendant

railroad company to include in its conveyance of lands, specified and described in such patents, *a reservation to the United States of lands by it conveyed that might be determined to be mineral in character* and such subsequent deeds were necessarily accepted by its grantees, subject to such exception or reservation, and we contend *that such subsequent* reservation is conclusive on the question of acceptance and intent of the defendant railroad company.

In connection therewith let us suppose that a section of land thus and in such manner conveyed by the railroad company, defendant, to John Doe should prove to be richly mineral in character and under the grant, patent, and subsequently reserved conveyance of the defendant railroad company, the United States should lay claim to the title thereto, in a suit against the said John Doe, will it be contended that John Doe could successfully argue that he and the railroad company illegally entered into the agreement and thus defeat the action of the United States?

II.

The exception in the patent but gave expression to its base, namely, the grant of July 27, 1866, and in no event may the evidence of title, the patent, be greater in its legal effect than the base of such title.

As the evidence of such grant it must conform to such title and the presumption that it does so conform is necessarily based on the presumption or fact that the question of fact, namely, the mineral character of the land conveyed was determined prior to the issue of the patent.

Regardless of any argument regarding presumption of examination, of any determination concerning the quality of the land, the two following propositions cannot be disputed, namely:

1. *The patent bears on its face the statement* that the quality of the lands had not been determined by the Land Department prior to the issuance of the patent, and

2. That the defendant railroad company accepted such patent without objection or dissent and with full knowledge of *the fact of non-antecedent determination* of the quality of the land.

As a matter of law and as pointed out in many decisions of this Court, the patent will be presumed to have been accepted, in the absence of dissent or objection on part of the patentee, without actual delivery and the date of such presumed acceptance will be of the time when the patent has been recorded in the General Land Office.

Leroy v. Jamison, 3 *Sawyer*, 369 (per Mr. Justice Fields sitting at Circuit).

In this case, however, it specifically appears that the patent *was actually received and accepted* by the defendant railroad company and it was actually recorded in the office of the recorder of the County of Fresno, California, by the defendant railroad company on the 26th day of February, 1895, some eight months after the patent was executed, the date of execution being July 10, 1894.

The acceptance of the patent by the defendant railroad company was complete in every detail, there being not only a presumed but an actual acceptance followed by recordation in Fresno County by the defendant railroad company.

Now, *some eighteen years after such fact*, the railroad company for the first time questions the legality of the transaction and urges that the mineral exception is nugatory and void, the base of its contention being that such mineral exception of *known and unknown* mineral lands constitutes an unlawful limitation of and diminishes the grant or contract which, as a matter of legal fact, also excluded from its operation *known or unknown mineral lands!*

Of course such a contention is futile and such contenton must be resolved against the defendant corporation and if it is to prevail in this controversy, it would be necessary to place the decision on other grounds, but we contend that all other avenues of escape are closed to the defendant railroad company by reason of its unqualified acceptance of a patent that simply gave expression to the voice of the granting statute, namely, that under the guise of such statute it would not be possible for the defendant railroad company to take and retain mineral lands, *known or unknown mineral lands.*

The claim of the railroad company in this particular instance is wholly without equity. It has never been in possession of the controverted lands—has never expended a dollar thereon and so far as the record shows has never paid a penny in taxes. Its claim is purely *technical* and opposed to the wishes and policy of the law and of the United States.

That the acceptance of the particular patent herein precludes the defendant railroad company is established by the following authorities:

1. *Leroy vs. Jamison,* 3 *Sawyer,* 369, in which Mr. Justice Fields speaking on the subject said:

> "It has been assumed, rather than stated, in the argument of counsel, that when the government is bound, the patentee is also bound *without* reference to his assent on the subject; but nothing is farther from the fact. *No one can* be compelled by the government any more than by an individual to become a purchaser or even to take a gift. *No one can* have property, with its burdens or advantages, thrust upon him *without his assent.* In order, therefore, that the patent of the government, *like a deed of a private person,* may take effect as a conveyance, so as to *bind* the party to whom it is executed and transfer the title to him, *it is essential* that it should be accepted. As the possession of

> property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, *whether the conveyance be a patent of the government or a deed of an individual, will always be presumed* in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance.
>
> "There is in this respect *no difference* between *the patent of the government and the deed of a private individual.*"

The opinion of Mr. Justice Fields in such regard was specifically cited and approved by this court in the following case; namely:

United States v. Schurz, 102 *U. S.,* 399, where this Court said "The subject is very fully and ably discussed by Mr. Justice Field in the case of *LeRoy v. Jamison,* 3 *Sawyer,* 369," and has also been cited approvingly by the California Supreme Court and several other Courts. The case has never been modified, criticised or restricted in any other case.

Coupled with the opinion of Mr. Justice Fields in *Fremont v. Flower,* 17 *Cal.,* 199, to us, the case seems conclusive of this controversy.

In the latter case Mr. Justice Fields, then Chief Justice of the Supreme Court of California, said (p. 225):

> "The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation *and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals.* From the operation of conveyances of this character, that is, of individuals, the minerals of gold and sliver are not reserved *unless by express terms.* They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the

patent, the instrument of transfer of the governmental proprietors, the United States, *no interest in the minerals remains in them without a similar reservation.*"

Counsel will not contest the proposition that as between individuals the acceptance of a deed excepting and reserving mineral or mineral lands to the grantor would be conclusive as against the grantee.

If the rule announced by Mr. Justice Fields in *Fremont v. Flower,* namely, that the patent of the United States is to be construed under the rule relating to the construction of deeds between individuals then this case is ended. A grantee in the case of deed between individuals would:

1. Be bound by the mineral exception.

2. Would be estopped from disputing the title of his grantor in the minerals or mineral lands.

The ruling of Mr. Justice Fields has never been modified in such particular but on the contrary has always been sustained and is sustained by the cases.

If it be contended that the statute of July 27, 1866, did not warrant the inclusion of the mineral exception, the first answer is, *such* was the contemporaneous construction of the statute for forty years by those whose duty was to construe the statute and carry it into effect and such construction will generally control this Court.

If the defendant railroad contends here as it did in the Courts below, namely, that it received *no consideration* for the inclusion of the mineral exception, the answer will be that it was not entitled to receive any compensation for *relinquishing* what it *was not entitled to receive,* namely, mineral lands.

After the decision in the Barden Case the railroad land grant companies were persistent in their attempts to evade the law and resorted to every barrier of the law to defeat the statute and the policy of the United States. Before the

Barden case it was claimed that only the few *known* mines in imperial domain granted to the railroads were precluded from the operation of the grant.

Later the contention was that the "grant in the patent" could not be limited by the mineral exception as the exception might be as extensive as the grant and thereby defeat the same. *The defendant railroad company is proceeding under the theory that the Courts only lack common sense.* For instance, the patent under consideration, No. 22, carries or covers 440,000 acres while the suit of the government to recover the mineral portion thereof includes or covers only 115,000 acres and this suit includes only 3,200 acres. Thus, practically, the co-extensive theory of repugnancy is destroyed.

The claim of the United States is based on a thorough geological examination of the lands described in patent No. 22 and only about one-third (⅓) were found to be mineral but we think if every acre in that patent was determined to be mineral it would not affect the matter for it was not for the defendant railroad company to say what lands should be granted and the law *forbade* the *granting* of mineral lands and if every acre in the patent was mineral land it would simply follow that such land would not pass to the defendant railroad company.

It must be remembered, that, *as a fact* the theory that the exception might be as extenisve as the grant has been demolished. The government claims, after exhaustive examination, that only about twenty-five per cent (25%) of the lands included in patent 22, are mineral in character.

Under the grant, as based on the miles of construction between Goshen Junction and San Jose, the defendant railroad was entitled to about 2,500,000 acres of land. *At least* 80% of those lands have been determined to be agricultural in quality. The report of Commissioner Knox

shows that the railroad defendant has 10% of all the timber in the United States. Since the date of the Hitchcock ruling in 1904, the defendant railroad company has received *unexcepted* and *non-reserved patents* for upwards of ten million acres of land. It has received patents for thousands and thousands and thousands of acres of the richest agricultural land in the World—in Imperial Valley and under the great Governmental reclamation dam of the Colorado near Yuma—"The Yuma Project." *Of all the myths* in this case, the theory of "co-extensive repugnancy" is the most *absurd*. Even before the Barden case the theory was repudiated by the Supreme Court of California in the case of McLaughlin v. Powell, 50 Cal., 64, and it seems to us, under the *Barden case,* that in law, the theory is not tenable in any event.

The California Supreme Court said, considering the subject:

> "The fact cannot be assumed *that all* the lands described in such patent are mineral lands, *as* the exception *does not necessarily extend to all the tracts granted."*

The defendant railroad company was not obliged to accept a "repugnant patent," but it elected not only to do so but expressly agreed the "repugnant" proviso should be inserted in the patent.

We assume this Court will take judicial cognizance of the fact that only a very small percentage of the *immense* grants to the Pacific Railroads have proven to be mineral in character *and that every acre of mineral land lost has been compensated by lieu selections within the idemnity limits of the grants.*

The exception of streets, blocks, houses, alleys, etc., repudiated by this Court in *Deffeback v. Hawke* (supra) was,

prior thereto, many times passed on and repudiated by the Supreme Court of Montana and the reasons for such repudiation were given in detail by the Montana Court and simply re-affirmed in this Court without elaborate statement.

The cases on the subject were collated and digested in *Talbot v. King* (Montana), 9 *Pac. Rep., pp.* 435-6, where the Court said:

> "The principles enumerated in these cases apply with much force to a case where the land office, without authority of law, inserts an exception into the granting part of the patent, whereby *the title of the patentee is defeated.* The Pawnbroker mining claim, at the time of the issuance therefor, was a valid claim and possession, under existing laws of Congress, *and the patentee* was entitled to the *exclusive* possession and enjoyment of *all the surface ground therefor.*
>
> *There was no law depriving him* in any manner of the right of such possession. *He had purchased* the property and paid for it and *was entitled to a conveyance of the full and complete title.*
>
> As between individuals he stood in a position to compel such a conveyance. There is no law authorizing the land department *to except the surface* ground from the conveyance or in any other manner abridge the title of the purchaser * * *"

The transcript in the Deffebach-Hawke case does not contain the patent passed on, but in the analagous case of Weibbold v. Davis, 139 U. S., 507, the same question arose and the same ruling was made as in the Deffebach-Hawke case. A copy of that patent will be found in the appendix to this supplemental brief. The briefest examination of the case will show that there had been the fullest and most complete determinations of all questions of fact, and the patent on its face showed such facts and also showed *complete compliance* with the law on part of the purchaser and, of course, any attempt to limit his surface rights by excepting

therefrom streets, blocks, alleys, etc. Still, Judge Ross based his opinion that our exception was void on the language in those cases.

Our proposition in such regard is so self-evident it is, we submit, unnecessary to argue further that the Deffebach-Hawke and Weibbold-Davis cases are not authority for the position of Judge Ross.

In connection therewith it is pointed out in the same Montana cases that the townsite patent contained the following exception:

> "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper or to any valid mining claim or possession held under existing laws of Congress."

This exception in a patent has always been held valid and binding. *No one has ever successfully disputed the validity of such an exception*, BUT *there is nothing in the townsite act* that authorized the inclusion of such *an exception in the patent.*

Why then is its inclusion valid? For the simple reason that the exception gives expression *to the intent of the granting Act.*

The exception of gold and silver and known mineral in the basic Act is not broader than the language of our granting Act that excluded "all mineral lands." If the former exception could be carried legally into a patent it is *unreasonable* to argue, we submit, that the latter exception could not legally be inserted in a patent.

There is as much authority for such insertion in the last as in the former instance.

All the patents that issued for confirmed Mexican grants in California under the Acts of 1851, 1860 and 1864 pursuant to the treaty of Hidalgo-Guadalupe contained the

exception that the said patent should not be conclusive of the rights of third persons, and this Court, and the Supreme Court of California have had many occasions to pass on the exception and followed it in every instance, but there is no direct instruction in the Acts of March 3, 1851, or any subsequent Act of Congress to insert such an exception in the patent and the exception is valid simply *because it gives expression to the intent of the statutes* regulating the issuance of a patent and such a patent is held to be binding on the patentee in the absence of express dissent, and is only conclusive as between him and the United States and is not conclusive as against third persons, *but* it would be conclusive as against third persons if it were not for the insertion of the exception which simply gives expression to the statute, although there is no direct instruction in the statute to insert the exception in the patent.

In *Reynolds v. Iron Silver Mining Co.*, 116 U. S., 687-97 the placer mining law, and a placer mining patent containing an exception not directly authorized by the statute in such instance, was passed on by this Court. The plaintiff claimed under a patent which contained, amongst others, the following exception:

> *"2. That should any such view or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it."*

The placer mining law under which that patent issued contained no direction to insert such an exception in the patent; like the instance here, *it was simply declaratory of the law.*

The statute under consideration in that case expressly precluded from its operation, lodes, veins or mineral bear-

ing quartz from its operation and the land department construing the statute carried the exception into the patent.

The statute under consideration here expressly precluded mineral land from its operation and the land department construing the statute carried the exception into the patent.

The patentee in that case as in this case claimed the patent was conclusive of the character of the land and carried the full legal title to the patentee of all land, and all rights, within the exterior boundaries of the exterior boundaries of the patent.

This Court, amongst other things said:

> "Yet, while the lode is not mentioned in the patent, the Court (below) held that for the purposes of this suit the title to it was conferred by that instrument. *It appears to us* that such a proposition is opposed to the *policy of the Acts of Congress* in the different rules in which it applies to granting title to placer mines, and to vein, lode and fissure mines; *to the express language of the statute* and to the RESERVATION IN THE PATENT ITSELF * * *. It is said that this part of the patent (the exception) is void because it is in conflict with the rights of the claimant of a placer mine under the Acts of Congress.
>
> Without deciding on the effect of the *acceptance without protest* of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, *it is sufficient to say that these conditions but give expression to the intent of the statute.*"

Can it be successfully contended *here* by the defendant railroad company that the mineral exception in the patent that was by it accepted, *without protest,* did not give expression *to the intent* of the Act of July 27, 1866?

In considering that case and some of the cases in which it was later cited, it must be remembered that "all mineral

land" was by statute and under the policy of the law reserved from disposition under any method other than provided for the mining laws. Only under the mining laws was it possible or legal to secure mineral lands.

The defendant railroad company has evidently realized the difficulty of its position, and all through the litigation has contended that the mineral exception was void by reason of the contention that the patent having issued it must be presumed that there was in fact an antecedent determination by the land department that all the land embraced within the boundaries of the patent was non-mineral. The land was not described in the patent *as a whole*, but was conveyed by legal subdivisions, namely, by sections and approximately *seven hundred sections* were described in the patent. The determination required was of a "fact," not the mere issuance of a patent which, as said by Judge Bean in the Oregon Circuit and by the California Supreme Court in Gale v. Best, and by Judge Gilbert, *on its face repelled any inference that there* had been an antecedent determination of the "fact" whether the lands described in the patent were mineral or agricultural. That such antecedent determination was absolutely necessary is stated by every and all of the cases, and to us it seems to be trifling with the law and dignity of this Court for the defendant to assert that the *patent shows that such duty was performed.* Suppose the patent read, as the record shows, "There having been no antecedent determination of the mineral or non-mineral character of the land herein described the patent is issued subject to the following exception, yet excluding, etc.," would the defendant railroad company be in a position to assert that this Court must presume by reason of the *issuance of the patent* that there had been an antecedent determination of the fact of quality? Will it be contended

that the inclusion of such language would strengthen our claim that there was no such antecedent determination when the mineral exception as included conclusively repels any inference that there had been any such determination?

As we stated in our general brief, there are many classes of patents in which, following a *practice of a half a century*, exceptions of various kinds have been inserted in patents without provision in the granting Act expressly directing the insertion of those exceptions and their validity has never been questioned, and in none of those instances *is there as much* direction for the insertion of an exception as in the patent under consideration here. The granting Act of July 27, 1866, expressly precluded mineral lands from passing under the granting Act, the joint resolution of June 28, 1870, reiterated the preclusion of mineral lands and provided the Secretary of the Interior should issue a patent, expressly saving and reserving * * * together with the other conditions and restrictions provided for in the 3d section of said Act. (Act of July 27, 1866.)

The only "other" restriction in said granting Act and its 3d section provided *"that all mineral lands be and the same are hereby excluded from the operation of this Act."*

How could mineral lands be *"saved and reserved"* except by an exception in the patent?

In only one way; namely, by an antecedent examination and determination of the fact of quality and a statement of such fact in the patent (Barden Case).

In the absence of such an antecedent determination, how could mineral lands be "saved and reserved"?

Only by a mineral exception in the patent. Go a bit further. The Secretary is about to issue a patent *based wholly* on the records of the various divisions of his department. His duty at that moment is to *"save and reserve"* certain

mineral preclusions. The same are not of record in his department. No investigation has been made—no determination of the fact of quality has been made, still it is the duty of the Secretary to "reserve" them, reserve them to the United States.

How shall he reserve them? He does not know that they exist; he cannot describe them!

How then can he "reserve" them? Only in one way, and that by an exception in the patent. So then, he, the defendant railroad applicant, silently standing by, directs a patent to issue, yet excluding by the transfer all mineral lands. The railroad applicant makes no protest. The patent issues and the railroad company, without objection or protest, *actually accepts* (not by implication or protest) the patent and Records it in Fresno County, California, and disposing of many portions of the land described in the patent, actually carries the mineral exception in favor of the United States *into its deeds* to its various grantees!

How does the railroad patentee meet the proposition that it is not bound by the acceptance of the patent? By various suggestions, namely:

1. That the exception was not authorized by the granting act or by the joint resolution.
2. That even if authorized the mineral exception may not be inserted in a patent where there has been an antecedent determination of the fact of quality.
3. That the railroad applicant was entitled to patent for all the sections with its list, *not mineral in quality*, and it being the duty of the Secretary to determine the fact of quality and thereupon to issue a patent for all land found to be *non-mineral*, the issuance of the patent, notwithstanding its language established the conclusive presumption that the Secretary did his duty, and the issuance of the patent is the determination of the fact that the land is non-mineral and therefore the insertion of the mineral exception was a nugatory Act.

In answer to such a strained construction, let us consider the exception not as an exception, but as words contained in the patent. It is elementary that a patent must be read as and interpreted *as a whole.* All its language must be taken *together* and all considered. Let us lay aside the theory that a *"mineral exception"* is under consideration, but rather a patent is before this Court *to be considered as a whole*—that is law. Now what is the fact and how is the patent to be construed? All of us are bound by its recitals. If the patent stated in the language of the Barden case that the *land* was non-mineral, that would be an end of this case. If the patent recited the land was mineral the patentee would be out of Court.

If the patent recited there had been an antecedent finding of fact that the land was agricultural, the patent would be conclusive.

If the patent was entirely silent on the question of quality and if this Court was wholly wrong in the Barden Case, then it might be presumed that the Secretary of the Interior fully performed his duty and that the issuance of the patent was a determination of all antecedent facts necessary to uphold it.

We think it will be also conceded that if the patent contained a recital that the fact of quality had not been decided that independent of any mineral exception the patent would not be conclusive.

We think, also, it is the law that if the Secretary of the Interior in violation of law issued a patent without antecedent determination of the fact of quality that the legal title to the mineral lands remained in the United States and those mineral lands were open to location, under the mining laws of the United States under the theory that the legal title to the lands described therein did not pass thereunder, but remained in the United States and that the land remained as part of the public domain.

Now let us examine the patent and ascertain if it does not appear on the face of the patent *that* there was no antecedent determination of the fact of quality and in that connection we find:

1. That the patent contains no recital which show such a determination.
2. The patent contains no statement concerning the quality of the land.

And in such connection the record on which the patent is based shows:

1. That there was no such antecedent determination.
2. That the approval of the railroad application for the patent expressly provided no mineral land should be included in the patent.

After the granting clause followed these words: "Yet excluding and excepting 'all mineral lands' should any such *be found in the tracts aforesaid,* but this exclusion and exception according to the *terms* of the statute, shall not be construed to include 'Coal and Iron Lands.' "

1. It must be conceded that that paragraph is a part of the description and part of the conveyance.
2. The rule of construction of the paragraph must be in favor of the United States and against the railroad patentee.
3. Can any rule of construction that is applicable to this case resolve that paragraph into any other conclusion than that it is a statement that *there had been no antecedent* determination of the fact of quality?

What is the exclusion? Is it of lands known to be mineral? What does it refer to?

To lands that *may be found* to be mineral? Such lands could only be found to be mineral by *future* search and in-

vestigation! If they *had* been found to be mineral or non-mineral the case would be ended, but the language indicates at least within the rule of construction that the question was an open one, that nothing was known concerning the same and that the entire matter was left for *future* investigation and determination, and if any lands were *found* to be mineral those legal subdivisions would not pass to the railroad patentee.

Such was the construction placed on the language of the paragraph by the California Supreme Court prior to the Barden decision and such was the construction placed on the paragraph by Judge Bean in the Oregon Circuit Court, and by Judge Gilbert, and by the California Supreme Court.

This construction, the reasonable, rational and *true in fact* construction is borne out by the record on which the patent is based, the acceptance of the same by the defendant railroad company, *without protest*, and the subsequent acts of the defendant railroad company *in carrying the substance of the paragraph into its deeds and conveyances to third persons.* As between individuals there could be no possible escape and if a patent is to be construed like a conveyance between individuals, the question would be ended. Of course, we admit, that if the lands had been earned and their quality defined it would not be legal to place any words or language into the patent that would diminish the grant but that question is not here for under *no* circumstances did the language *diminish the quantity* or quality of the grant.

Judge Ross in his opinion in the Roberts case did not at all pass on this question but toward the end of his opinion quoted *Deffebach v. Hawke, supra*, as follows:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of *conveyance, with recitals showing a compliance with the law* and the conditions which it prescribed."

Very true, but that case is not here. If the patent in our case contained "recitals *showing compliance with the law and the conditions which it prescribed*" this suit would never have been instituted or if instituted would have expired quickly and we are quite content to stand on the citation for our patent contains *not one* recital showing compliance with the law requiring an antecedent determination of the *fact of quality*.

Elsewhere in the general brief and in this supplemental brief we have fully discussed the Deffebach-Hawke, and Weibbold-Davis cases, and showing, we submit, that they are not authority against us.

It is true that an officer of the land department cannot limit a grant but it is equally true that such officer cannot add to the grant lands which were precluded from the operation of the grant. The contention of the defendant railroad amounts to this: that by the patent, in violation of law the officers of the land department passed to the railroad company a large acreage of mineral lands, and the result is the same whether the officers did not know at the time of patent that the lands were mineral. The officers could not legally enlarge the grant, still, if the contention of the railroad defendant be well founded, those officers did so enlarge the grant in issuing a patent without determination of the fact of quality.

A grant of all certain described lands as are not "legally claimed" by any other person *did not authorize* the issuance of a patent *until the rightful* claims of others *had been ascertained*. (*LaFayette v. Kenton*, 18 How., 198.)

In that case there was a patent to General LaFayette describing the out boundaries and containing a reservation of all tracts of land legally claimed by other persons and when General LaFayette later attempted to *enforce the patent* he was defeated *through force of the reservation* and

there was no express direction in the grant to carry the exception into the patent and the insertion was valid and operative simply because it gave expression to the intent of the granting Act.

The railroad company might have refused and returned the patent and in that event it would have been inoperative and the railroad company would not have been bound by the same and could have waited until the determination of the fact of quality and then received a patent to the land that it was entitled to receive.

Maguire v. Taylor, 8 Wall., 671.
LeRoy v. Jamison, supra.

The foregoing discussion naturally leads us to the remaining enquiry as to whether the defendant railroad company by its acts of acceptance is estopped to deny the validity of the mineral exception—a long line of state and federal cases culminating in *Cowell v. Colorado Springs Co.*, 106 U. S., 55, squarely hold that: "A person claiming under a deed containing a condition, *exception* or reservation is bound thereby and cannot take the conveyance *without assuming all its terms, conditions and obligations.*" We assume such a proposition as between individuals will not be disputed but it may be contended that the rule is not applicable in this instance because, as alleged in the Courts below, the mineral exception is utterly void and that an estoppel may not arise out of a void premise. That a patent with an exception, reservation or condition is to be construed as would be a deed, with like exceptions, between individuals is pointed out by Mr. Justice Fields in Fremont v. Flower, *supra.* If a decision to the contrary exists the writer has been unable to find it. Therefore we deem it unnecessary to discuss the subject further and pass to the second division of the subject, namely, where one having

the right to accept or reject a transaction he becomes bound by the transaction and cannot avoid his obligation or effect by taking an inconsistent position therewith and is thereby estopped from questioning *the validity* and effect of such an agreement or act. The only qualification is this: In order to constitute an estoppel the agreement must have been voluntary with a knowledge on the part of the corporation of its right *(Cyc. Vol. 16, pp. 789-90-91, with state and federal citations).*

Passing to the question whether an estoppel runs against the defendant railroad, we concede in the instance of an antecedent determination of the fact of quality, that if the agreement to insert the mineral exception was forbidden by law after such determination it would be inoperative but there is a radical difference between an act for which there is no legal direction and an act that is itself illegal or specifically forbidden by law. If the mineral exception was not authorized by the granting act and joint resolution it may still be said that those acts did not interdict the insertion of the mineral exception and thereby the parties had the right to include the same in their actual or implied agreement for it was consistent with the intent of the statute, the policy of the law, good morals, the rights of the parties and the real legal, equitable fact, and especially so, as at that time in the absence of an antecedent determination of the fact of quality, the defendant railroad company *was* not *entitled* to a patent and the department was not authorized to issue one without inserting the mineral exception (*Barden Case*).

In connection therewith we think that as the defendant railroad company accepted a patent bearing on its face the fact that there had been no antecedent determination of the fact of quality, that it is now estopped from claiming that there was such an antecedent decision.

"Qui non prohibit quod prohibere protest assentire videtur," such is the ancient language of the law on the subject and we can make no stouter argument.

In the courts below the defendant did not argue very strongly against the proposition but was content to argue that in any event complainant was not privy to the transaction and could not avail himself of the estoppel and that only the government could plead estoppel.

It is obvious, we say, in answer, that the *only result* of the estoppel was to retain the legal title to the mineral lands in the United States and if the legal title to the mineral lands remained in the United States THEN the mineral lands were subject to location under the mining laws of the United States, and when our title is clouded by a claim of the defendant railroad we have the right, we submit, to contend that under the estoppel running to the United States, the legal title to the land in controversy remained in the United States and thereby we had the right to make the mining location and to institute this suit.

If the land is mineral then by making the mineral location we became privy to the paramount title *and to the estoppel running to the paramount title.*

II.

WHAT WAS THE LEGAL EFFECT OF THE INSERTION OF THE MINERAL EXCEPTION IN THE PATENT PURSUANT TO THE ASSENT AND AGREEMENT OF THE SOUTHERN PACIFIC RAILROAD?

It appears by the record, the certificate of the Circuit Court of Appeals, that the mineral exception was inserted in the patent *pursuant to the express agreement and assent of the Southern Pacific Railroad Company.*

Arguing against the effect of such agreement in the courts below, the defendant railroad company asserted that the agreement was not binding and gave two reasons for such contention, namely:

> 1. That they had no control over the form of the patent and were not bound by the unauthorized acts of the officers of the land department.

The reply to such answer is obvious—the admitted fact in the record here is that the defendant railroad company *consented in fact, independent of any implication, to the insertion of the mineral exception.*

In the second place they contended that the agreement was without consideration and therefore not binding. No further argument was made.

The contention is fallacious for two reasons, namely:

> 1. The railroad company was not entitled to receive any consideration for agreeing not to take what the law said should not be taken under the non-mineral grant, namely mineral lands.
>
> 2. As a matter of fact a very valuable consideration did flow to the defendant railroad company, namely, it received, excluding the mineral lands contained in patent, No. 22, upwards of 325,000 acres of land, subsequently determined to be agricultural in character without any antecedent examination or *expense on its part,* and at a time when the railroad company needed the asset and long *prior* to the time the corporation was entitled to receive the agricultural land.

If counsel would consent to refer to the necessities of the corporation that made valuable the issuance of such patents to it at said times there would be no question of the great consideration that flowed to the defendant railroad at such times.

There is nothing involved, complex or intricate, concerning the legal result of such mineral exception agreement. *It was in accordance with the practice of* the land department, *the policy of the law, the intent of the statute, the wishes of the parties and the necessities arising from the non-antecedent examination and determination of the quality of the land.* Forty thousand words would not enable us to make a further and stronger argument and the question is so clear that we submit it without any further contention, except to say that thereby and as a result thereof the legal title to the controverted lands remained in the United States and they *continued* to remain subject to location or relocation under the mining laws of the United States.

It is true when there is no power or authority by law in officers or agents, no void act of their's can be cured by aid of the *doctrine of estoppel,* (2 *Herman on Estoppel and res adjudicata,* 1365; *Rush v. City, etc.,* 80 Cal., 6; *Martin v. Zellerbach,* 38 Cal., 300; 99 Am. Dec., 365; *Thompson v. Doaksum,* 68 Cal., 593; etc). But it will be found on examination of *all the cases* where in such instances it was held the doctrine of estoppel was not applicable, the ruling was made in instances where the act was either in violation of positive law or where there was no law that permitted the transaction, as for example, where municipal officers without charter or other authority contracted for municipal improvements, etc., or in proceedings *in invitum* where no divestment of property may be made without a strict compliance with law or in instances where a Board of Supervisors or Superintendent of Streets, attempt to grant extension of time for the performance of a contract, after the expiration of the time limited in the contract.

(*Beveridge v. Livingston,* 54 Cal., 54; *Fanning v. Schammel,* 68 Cal., 428; *Dougherty v. Coffin,* 69 *Cal.,* 454).

It is like a contract between individuals where there is an agreement to pay a greater rate of interest than is permitted by law. The fact that a party under such agreement made no protest for a while and paid at various times the forbidden rate, would not estop him from subsequently setting up the invalidity of the agreement.

Many illustrations might be made along similar lines and instances.

A corporation is forbidden by law to issue its stock on credit but B contracts with a corporation to buy stock on time payments and the certificate is issued on a payment of ten (10%) per cent and from time to time B makes further payments, until the entire legal amount is paid to the corporation.

Will it be contended that B is not thereafter estopped to deny the validity of his agreement? Still the original agreement was forbidden by law.

The California Civil Code provides that a certificate issuing under certain circumstances for stock not fully paid, must show on its face the amount paid in at the time of issue. Suppose a certificate issues in contravention of the statute and after full payment passes for value to a third person, is not the corporation estopped to deny the validity of the certificate?

Even if it be admitted "there was no power or authority in law for the officers of the land department to insert the mineral exception," it does not follow in an instance when the patentee *had the absolute right* to reject the patent and to call for a proper one, that the assent of the patentee was a puerile act, not binding on him, and especially so since the law forbade the passing of mineral lands.

Take for for instance, the case of a Mexican patent issuing under the laws of 1851, 1860 or 1864. A makes application for a confirmation of a Mexican Grant claiming a

grant two miles square and the grant is confirmed by the Board of Land Commissioners and the United States District Court and is surveyed under the Act of 1864 and the survey is in accordance *exactly* with the decrees of confirmation and thereupon the survey is approved by the Department of the Interior, but later the land department tenders the claimant a patent for a lesser area or excluding from the patent the easterly portion of the inner bay of San Pedro (*De Guyer v. Banning,* 167 U. S., 723), and the patentee accepts the same and remains silent for twenty years!

Will not he be estopped from denying that the land officers had no right to exclude the easterly portion of the inner Bay of San Pedro *(containing islands that passed under the grant and decrees of confirmation) from his patent (De Guyer v. Banning, supra.)*

There was no authority in law for the making of that exception. Nevertheless the Court held that under the exception in the patent *the islands in the excluded portion of the bay did not pass to the Mexican grantees.*

So it was in the case of the patent of General La Fayette (*supra.*)

Neither De Guyer or General La Fayette were permitted by this Court to say that the exception did bind them.

In Fremont v. Flower, supra, Mr. Justice Fields said that an exception in a patent of minerals, of gold and silver, was necessary in order to retain the legal title in the United States.

It was absolutely beyond the power or jurisdiction of the land officers to make a grant of mineral land to the railroad corporation.

If a patent based on an apparently perfect record and perfect on its face and in its recitals issued through fraud, imposition or mistake, the legal title would pass and no

subsequent locator could question the transaction or take upon himself the right of protecting United States. If the United States refused to bring the proper action the incident would be closed, but where the legal title did not pass under a patent, perfect or imperfect on its face the land would be open to entry (*Doolan v. Carr*, 125 *U. S.*, 625) and the holder of such a patent could not successfully say that such an entryman was estopped to deny the validity of his patent.

In consideration of the question of estoppel we submit the following rules should control the Court in this instance:

> I. Every part of the patent must be considered so that effect may be given to what may appear to be the controlling intention of the grantor (*Pugh v. Mays*, 60 *Tex.*, 191.)
>
> II. The estoppel will be limited by the apparent intention of the parties (*Colonial Bank v. Hepworth*, 36 *Ch. Div.*, 36.)
>
> III. Estoppels are mutual and bind both parties or neither (*Schuman v. Garrett*, 16 *Cal.*, 101; *Franklin v. Dorland*, 28 *Cal.*, 115; 87 *Am. Dec.*, 111; *Gordan v. City of San Diego*, 101 *Cal.*, 522.)

For example: If it be insisted that the United States is estopped from disputing any statement, recital or term of conveyance used in the patent, it is equally true that the defendant railroad company is also estopped from disputing any term of conveyance or any part of the description contained in the patent. If as said by the California Supreme Court in several cases that the *Exception is part of the description*, it follows that both the Government and the railroad company are bound by it and mutually estopped to deny it. *Every reservation and exception* contained in a deed between individuals *has always been construed as a part of the description.*

A conveyance without a description would be a *nullity*. The patent conveys by legal subdivisions *excluding* the mineral subdivisions.

The title to the non-mineral subdivisions is perfect; *no title* passed to the mineral subdivisions—the patent does not purport to convey the land as a whole, *but specifically by non-mineral* legal subdivisions. For example, A owns one hundred city lots numbered from 1 to 100; diamonds have been found on some of them. A conveys the one hundred lots to B, yet expressly excluding from the transfer such of the lots as may be found to contain deposits of diamonds. Is it not the rule in such instance that B would be estopped from claiming title *to the lots* on which it was ascertained there were deposits of diamonds? The discovery of such deposits on seventeen lots would not defeat the title to the remainder, but the term of description would estop B from denying that the title to the seventeen lots remained in A. The estoppel would be mutual and perfect. In this case the term of description applied to some *seven hundred sections,* while in this suit the term of description affects only *five sections.*

EXAMPLES.

Where a grant by metes and bounds excepts a tract by the name under which it is *generally known,* the tract so excepted does not pass by the grant (*Truett v. Adams, 66 Cal.,* 218.)

Where a deed described the land conveyed by courses and distances and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed (Painter v. Pasadena, etc., 91 Cal., 74.)

Reservation forbidding grantee from furnishing to others *rock* taken from the premises sold is valid (Parkovich v. S. P. Ry. Co., 87 Pac., 1097.)

A reservation in a grant is to be interpreted in favor of the grantor (Martin v. Lyodd, 94 Cal., 195.)
Butler v. Gosling, 130 *Cal.*, 422.
Smith v. Slears Rancho, 132 *Cal.*, 178.
Seans v. Ackerman, 138 *Cal.*, 583.
Adams v. Hopkins, 69 *Pac.*, 228.
13 *Cyc.*, 676-682.
16 *Cent. Dig. Cols.*, 607-614.

It seems to us that we are in such privity with the paramount title as to enable us to successfully contend we may avail ourselves of the estoppel running to the United States as the only effect of such estoppel was to keep the title in the United States and subject the lands to mineral location.

Since the writing of the main brief in this case the Circuit Court of Appeals, Ninth Circuit (Nov. 1, 1912), reversed the ruling of Judge Bean in the case of *Eastern Oregon Land Co. vs. Willow River, etc.*, by the vote of Judges Ross and Morrow, Judge Gilbert dissenting, and the net result of the decision is, that Judge Ross reiterated his opinion made in the Roberts case, with Judge Gilbert disagreeing with him, while Judge Morrow passed the subject and based his vote for reversal on grounds independent of the mineral exception. Judge Ross simply contented himself with a citation from his opinion in the Roberts case. He gave no additional reasons.

Judge Morrow did not pass on the question in any way and we may only speculate concerning his position on the question, except that he apparently conceded that "known" mineral lands were excluded from the patent.

His reference to the question was as follows:

> "* * * with the exception to the title to the lands in Secs. 21 and 27 in T. 14 S., R. 42 E., there is no serious controversy as to the title of the lands along Willow Creek described in the Bill of Complaint and

claimed by the complainant. It is practically conceded that the title to such lands passed from the United States to the State of Oregon by terms of the grant contained in the Act of Congress of February 5, 1867 (14 Stat., 409), and the Act of June 18, 1874 (18 Stat., 80), and that by mesne conveyances the title to the said lands vested in the complainant; nor is there any controversy that the granting Act, is by its terms a grant *in prae senti* and that the riparian rights appurtenant to the lands were not reserved or otherwise disposed of by the United States, but passed with the title to the lands to the State of Oregon and to its grantees. With respect to the title of Sections 21 and 27, the question is presented whether these lands are within the terms of the grant. They are within the primary limits of the grant and patents were issued therefor by the United States to the Dalles Road Military Company, and the title, if any, passed by grant or patent has become vested in complainant. But it is objected on the part of the defendant that the title to mineral land did not pass by either grant or patent and that the lands in these two sections are mineral land. * * * With respect to the ownership of Sections 21 and 27, the defendant alleges that said land, and particularly that part thereof occupied by said dam and to be occupied by its reservoir, is mining land and that the same is more valuable for its gold deposits than for any other purpose, and that it is and always has been absolutely valueless for any other purpose, except that of mining for gold; alleges that more than thirty years ago said land was filed upon as placer gold mining claims by predecessors in interest of the defendant under and pursuant to the laws of the United States governing the acquiring of placer gold mining claims; that the persons who so filed upon said land as such mining claims held, worked and occupied the same as mining claims, and that by proper mesne conveyances from said parties, said land has been conveyed to the defendant, and it was the owner thereof; that the defendant's predecessors in interest in said mining claims for the purpose of working said mining claims appro-

priated and used all the waters of Willow Creek naturally flowing through said lands during the Summer and Autumn seasons and used the quantity, etc. * * * The objection that the title to the land upon which the defendant was constructing its dam and reservoir was in dispute presents two questions, one of law and the other of fact. * * * The complainant holds a title to Section 27 derived from a patent issued by the United States to the Dalles Military Road Company on the 23d day of May, 1902; and it is contended on behalf of the complainant that the title to the land described in the patent passed to the grantee by proper conveyance and is now vested in the complainant and that the character of the land is not now open to inquiry unless it should be made to appear in a proper action that the patent had been procured by fraudulent misrepresentation on the part of the grantees as to the character of the land. No such claim of fraudulent misrepresentation is made in this case, but it is insisted that the grant did not embrace mineral lands and that the officers of the land department had no authority to issue a patent for lands containing mineral and that such lands were excluded by the terms of the patent.

The patent conveys in T. 14, etc., certain designated subdivisions of Section 21, containing 120 acres, etc., but provides 'Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid.' It was contended by the complainant in the court below, and the contention is renewed here, that the issuance of the patent by the Government of the United States to complainant's predecessor in interest was a conclusive adjudication that the land described in the patent was non-mineral.

It was admitted by the court that this probably was true if the patent contained no reservation, but it was the opinion of the Court that the reservation manifested an unmistakable intention on part of the Government not convey mineral lands and repelled any inference that the Department has adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.

The complainant contends that the issuance of the patent was a final adjudication by the only authority having jurisdiction to make the adjudication that the land described in the patent was of the class of lands granted by the Act under which the patent issued.

This identical question was before the Circuit Court for the Southern District of California in the case of *Roberts v. Southern Pacific R. R. Co.*, 186 F., 934. In that case Judge Ross held that where Congress had provided for the disposition of any portion of the public domain of a particular character and had authorized the officers of the land department to issue a patent for such land on the ascertainment of certain facts, such department had jurisdiction to inquire into and determine the existence of these facts, and in the absence of fraud, imposition or mistake, its determination was conclusive against collateral attacks.

From this decision complainant appealed to this Court and thereupon the Court certified the question in various forms pertinent to that and another case before this Court, to the Supreme Court of the United States, for instructions as to a proper decision of the questions.

The questions are certified under the title of two cases, namely, Burke v. S. P. R. R. Co., No. 1981, and Lamprecht v. S. P. R. R. Co., No. 2028. Whether a patent issued under the circumstances disclosed in the present case conveys to the grantee an absolute title to the land described therein subject only to direct attack for fraud, misrepresentation or mistake, or whether the conveyance is subject to the reservation excluding mineral lands should any such be thereafter found in the trusts conveyed, *must therefore* await the decision of the Supreme Court upon the questions submitted in the cases referred to.

But, assuming that the patent is open to this collateral attack, we are of the opinion that such an attack is not supported by evidence in this case. * * * The defendant is not a claimant of the land in dispute for its mineral character or its mineral deposits, nor, indeed is it a claimant there or elsewhere for land on account of its mineral character of its mineral deposits.

> It has taken possession of the land in dispute *not for* the purpose of carrying on mining operations but to *improve water for irrigation purposes.* * * * That the refendant has taken possession of the land in controversy to maintain and operate a dam for the storage quarters for the purpose of irrigating and bringing under cultivation desert and unproductive lands for *agricultural* purposes *appears to be a sufficient answer to defendant's general claim that the land is mineral land.* * * * *If the land is more valuable for such agricultural purposes as the defendant proposes than for its mineral deposits* then the land *belongs* to the complainant under the grant and patent *as agricultural land."*

We submit the appellees may extract no comfort from the opinion of Judge Morrow. He simply held that on the record that Judge Bean, a very great lawyer and the former Chief Justice of the Supreme Court of the State of Oregon, had erred in denying complainant an injunction *pendente lete.* Judge Ross agreed with him, basing his decision on his former opinion that the mineral exception was nugatory, but Judge Morrow did not agree with him on that subject. He cited Judge Bean and then cited Judge Ross, showing they radically differed on the question of the mineral exception and the record shows Judge Gilbert, equally as learned and distinguished as Judge Ross, agreed with Judge Bean rather than with Judge Ross.

Judge Morrow voted for reversal on grounds entirely independent of the mineral exception, on the ground that the plaintiff *was not* a *mineral* claimant, and the further ground that on the showing of plaintiff that the land *was agricultural* and had been taken up by the plaintiff *for agricultural purposes.* That is not the case here.

The only particular contention we have to make is concerning that portion of Judge Morrow's opinion where, dis-

cussing the testimony, he said, "There was no evidence that the boundaries of any claim had been marked upon the ground so that such boundaries could be readily traced, nor was there any evidence that a notice of such claim had ever been posted upon the ground or filed in the United States Land Office, nor was there any evidence tending to show that any steps had been taken under the laws of the United States to obtain title to the ground as mineral ground."

1. Our mining claims were taken up as legal subdivisions of surveyed sections; in such instance no marking on the ground is necessary.

Such a course is only necessary in an instance where placer locations are made on unsurveyed ground or where less than a legal subdivision is located.

2. Our Bill of Complaint alleges that locations notices were posted and recorded, etc.

3. It is evident the learned judge misspoke when he said there was no evidence that the notice of location was ever filed in the United States Land Office. There was and is *no law* that even permitted a mining locator to file his notice of location in a *United States Land Office*. In absence of statutory direction only a posting was necessary, and on absence of a local regulation no filing or recordation anywhere was necessary as the federal statute is silent on the subject.

Sometimes under local rule or State legislation mining recorders well selected and recordation was made mandatory with them or with the County Clerks, but it was never required by local rule, State legislation or Federal requirement that a mining location should be recorded or filed in a United States Land Office, and as a matter of fact it could not even appear at all in a United States Land Office until the mining locator got ready and was willing to apply for a patent.

4. There is no obligation or duty on part of a mining locator even to take any steps to obtain title under the laws of the United States to ground as mineral land.

In the appendix will be found the opinion of Judge Gilbert. We submit that he is entirely right, and his opinion sweeps away the mistakes into which Judge Ross fell. Of all the judges and judicial officers who have passed on the subject since the commencement of this suit, Judge Ross stands alone.

The Supreme Courts of Oregon and California differ with him concerning the effect of a patent for "known mineral" land; no one agrees with him that the "exception" could possibly limit or restrict the grant. Judges Bean and Gilbert positively disagree with him concerning the validity of the mineral exception. Judge Morrow in no way supports his views and convention, forbids us citing Judge Wolverton as he made no formal announcement. We respectfully submit that Judge Ross was wrong.

EDMUND BURKE,
Attorney in Pro. Per.

APPENDIX.

Exhibit "A."

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY, a Corporation,
Appellant,
vs.
THE WILLOW RIVER LAND AND IRRIGATION COMPANY, a Corporation,
Appellee.
No. 2007.

(DISSENTING OPINION, U. S. CIRCUIT COURT OF APPEALS.)

Gilbert, Circuit Judge, dissenting:

The appellee was engaged in constructing a dam across Willow Creek for the purpose of impounding the winter flood waters of that creek, and diverting the same for use in irrigation. The appellant brought the present suit to enjoin the construction of the dam, claiming equitable relief on two grounds: First, that the dam was being constructed upon, and when completed would flood certain lands belonging to the appellant, and, second, that by impounding the flood waters of the creek, the appellee would prevent the occasional flooding of 3600 acres of lands of the appellant lying at a considerable distance below the dam, which lands were alleged to be subject to annual overflow from the waters of said creek, and capable of irrigation therefrom. There was no tenable ground for demurring to the complaint on (*1) the ground that the appellant had

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(*Page number of original opinion.)

an adequate remedy at law for the recovery of the possession of the ground occupied by the dam or flooded thereby, for the relief sought as to such lands was coupled with a prayer for an injunction against preventing the annual overflow of the 3,600 acres of land of the appellant so alleged to be annually irrigated thereby. Upon the issues and the testimony, the court below reached the conclusion that as to the lands actually occupied by the dam and to be flooded thereby, the appellant's remedy was at law, and that no ground was shown for an injunction against the diversion of the winter flood waters from the lands of the appellant lying below the dam, for the reason that the evidence showed that no substantial injury would result to the appellant therefrom. It is now held by the majority of this court that the decree of the court below should be reversed.

One member of this court is of the opinion that the decree should be reversed on the ground that the lands which the appellee will occupy for its dam and reservoir are included within the boundaries of a patent from the United States to the appellant, and that although said lands are mineral lands, the exception in the patent whereby mineral lands are reserved is void. *With that view I am not in accord.* The patent was issued under the Act of February 25, 1867, which provided that the grant should not embrace mineral lands of the United States. The patent was issued May 28, 1902, and it repeats the exception which was contained in the Act in these words: "Yet excluding and excepting all mineral lands if any such be found in the tract aforesaid." *It is clear* (2) *from the language of the patent that no investigation whatever was made by the officers of the Land Office as to the mineral character of the lands, for it grants lands which "have been listed by the duly authorized land agent of said company, as shown*

by its original lists approved by the local officers and now on file in the General Land Office." As was said by the court below, the patent, when read in connection with the act "manifests an unmistakable intention on the part of the Government not to convey mineral lands, and repels any inference that the Department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral." The appellee acquired the title of the mining claimants to the lands so to be occupied by the dam and reservoir. Those lands lie in the creek bed in a canyon, and have been occupied as mining claims, some of them since 1862, and the most thereof since 1869. On April 25, 1908, one of the appellant's agents wrote to another of its agents that the land "involves about seven miles of creek bed, which has been mined over more or less for the last 35 years." In another letter he wrote, "we understand this land along Willow Creek has been mined off and on ever since 1862." In my opinion these mineral lands were excluded from the patent and never passed to the appellant.

The view of the other member of this court is that, *conceding that known mineral lands are excluded from the patent,* there is, notwithstanding, one tract of 10 acres, the southwest quarter of the northwest (3) quarter of the southwest quarter of Section 27, included in the lands to be occupied as a reservoir, upon which no mining location has been made, since no mining location filed in the County Clerk's office describes that particular portion of the section, and that therefore that tract of land passed to the appellant, and that the use to which the appellee proposes to put it affords ground for injunction for the reasons, (1) that the threatened trespass will operate to the destruction of the estate of the appellant in that 10 acres, (2) that the appellant has no adequate remedy at law, for the reason that the appellee is insolvent and unable to respond in damages, and that, in any view of the case, the appellant is

entitled to an injunction against the diversion of the flood waters which occasionally irrigate the lands of the appellant lying below the dam. These grounds for reversing the decree, I submit, are not sustained by the evidence. The evidence, I think, fully justifies the conclusion of the court below that all the lands which are to be occupied by the dam and reservoir are mineral lands, are in the possession of the appellee, and have been in the adverse possession of the appellee and its predecessors in interest for more than ten years prior to the commencement of the suit. The fact that a certain tract of 10 acres in Section 27 is not included in any mining location as the locations appear on file in the County Clerk's office should not be held to overcome the testimony of witnesses that it has actually been occupied for mining purposes. Mining locations as they have been marked upon the ground should prevail over (4) the calls and distances of the recorded notices thereof. But even if no mining location had actually been placed upon that particular tract, it is nevertheless mining land, situated in a mineral country, and surrounded by mining claims. This 10 acres of mineral land was in the actual possession of the appellee under a claim of title. The threatened acts of the appellee could cause no destruction thereof or injury thereto. It is undisputed that the land is of no value for agricultural purposes, and that its sole value is in the mineral which it may contain. A complainant out of possession may obtain an injunction against trespass upon real estate only to prevent destruction of the property, and only in cases where it is sought in aid of an action at law which is pending or is contemplated. Buchanan Co. vs. Adkins, 99 C. C. A., 246; Earhardt v. Boaro, 113 U. S., 537; Whitehead v. Shattuck, 138 U. S., 146.

The only proof of the insolvency of the appellee as ground for the appellant's resort to equity for relief is

found in a copy of certain proceedings in bankruptcy filed in this court since the submission of the case herein, which shows that the appellee has become insolvent. There was no allegation of its insolvency in the pleadings in this case, and no suggestion thereof was made in the court below or in the record which is presented to us. I submit that the proceedings in bankruptcy have no proper place in the case which is before us, and that we have no right to consider them. The question (5) before us is whether the court below erred in the decree which was rendered upon the pleadings and proofs which were before it.

Nor do I think that the trial court erred in its conclusion that the impounding of the winter flood waters of Willow Creek would result in no injury to the appellant's lands lying below the dam. The appellant in its bill alleged that 3600 acres of such lands which it owned were subject to the annual overflow of the waters of the creek, and capable of irrigation therefrom. There is no evidence even tending to show that more than one-tenth part of the 3600 acres has ever been reached at any flood of the creek. On the contrary the evidence fully sustains the conclusion of the court below that the lands of the appellant which were subject to the occasional and irregular winter overflows consisted of five or six small low-lying parcels of unimproved, uncultivated and unenclosed land whose sole crop is wild grass, the total quantity of which does not exceed 40 or 50 acres. The evidence shows that the winter flood does not occur every year, and that it floods these lands but two or three days and at a time when they are either already saturated with rain and snow, or are frozen so that the water merely passes over their surface. There is credible evidence, also, that these winter floods are an injury rather than a benefit to these lands.

Upon reading the whole of the evidence in this case, no unbiased mind can reach any other conclusion but that the

real object of the suit is not to prevent injury (6) to the appellant's lands, but to checkmate the scheme of the appellee to impound the flood waters of Willow Creek in order that the appellant itself might have the opportunity to organize a scheme to do the very thing which the appellee was engaged in doing. This is fully shown by the correspondence that passed between the appellant and its agents during the seventeen months preceding the commencement of the suit. As early as December, 1907, the appellant's agent at Vale, Oregon, received written instructions to keep close watch upon the operations of the appellee. Said the letter: "It may become necessary to organize the bench owners and the present water users who have sold, to resist the monopoly of the main flow of the creek." On December 23, 1907, the general agents at Portland wrote to the appellant at San Francisco suggesting a combination of land owners to bind themselves together to refuse to take any water from anyone, "thereby making it impossible for the company seeking to supply them to do any business, which would cause a lapse of their rights." The letter recommends that Clagett, the agent at Vale, be instructed to encourage the organization of the land owners in a scheme to oppose the plans of the appellee's predecessors in interest, and suggests that he become a member of the Land Owner's Committee so that he might obtain inside information concerning developments. The letter suggested that he would be in a position to "checkmate" the land owner's organization. In that letter it was further said: "Mr. Clagett's view that you have no defined water rights in connection with your Willow Creek lands means, we think, at the normal flow. We (7) suppose, as riparian owners of several tracts, you have certain legal rights which could be asserted against the monopoly of the flood waters." On January 6, 1908, the same agents wrote concerning the

efforts of the appellee to obtain control of the reservoir site, and of the strategic points along the creek by purchase, and said that if they did so, "they will probably have the bench land owners at a serious disadvantage. The latter must anticipate their obtaining this control. They should insist in a forceful way on a declaration by the syndicate of their plans. If no satisfaction is obtained, then action should be taken, with the assistance of skilled lawyers and engineers, to prevent the syndicate from getting detrimental control. Your position is the same as that of the individual bench land owners. Your lands will be deferred in their development if some way of bringing water to them is not opened up before the syndicate has obtained the control the methods they employ indicate." On January 10, 1908, the same agents wrote to the appellant as follows: "In their present state, your lands in this district are practically only nominally valuable. An irrigation undertaking will make them very valuable, if precaution is taken to bring them in or keep them out, as the shrewdest policy will dictate." On April 1, 1908, Clagett wrote the general agents at Portland: "Must confess we have misgivings in regard to the present situation. We have felt all the time that the Eastern Oregon Land Company was making a mistake in not adopting an active program (8) in regard to Willow Creek, and if we were confident that these people only contemplated a small undertaking, would advise a consideration of steps to secure options upon a portion of Willow Creek lands which control vested rights." When Clagett on the witness stand was asked what was the intended purpose of taking options on lands along the creek, he answered: "It was desired to checkmate them." The word "checkmate" appears more than once in the correspondence, and to checkmate the scheme of the appellee, Clagett testified was "undoubtedly" the purpose for which the present suit was brought.

In all of the correspondence and in the notices which were served upon the appellee, there is nowhere a suggestion that the construction of the dam and reservoir and the impounding of the flood waters will cause any actual injury to the appellant's lands either above or below the dam, or deprive the appellant of flood waters for the irrigation of any portion of the lands, or that it had ever applied any of those waters to a beneficial use.

I submit that the case as it comes to this court should be determined upon the issues that were framed in the court below, and that upon those issues and the evidence, the decree of that court was correct and should be affirmed.

(Endorsed:) Dissenting Opinion. Filed Nov. 11, 1912, F. D. Monckton, Clerk.

Exhibit "B."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 219.

JAMES A. TALBOTT, SPECIAL ADM'R OF ANDREW J. DAVIS, APPELLANT,

vs.

HENRY WEIBBOLD.

* * * * * * *

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title 32, there have been deposited in the General Land Office of the

United States the plat and field-notes of survey of the claim of Heinrich C. Wiebbold upon the Gold Hill lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that in pursuance of the said Revised Statutes of the United States, Henry C. Wiebbold did, on the nineteenth day of September, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 438 in the series of said office designated by the surveyor general as lot No. 65, embracing a portion of township three (3) north of range eight west of the principal meridian, in the Summit Valley mining district, in the county of Deer Lodge and Territory of Montana, in the district of land subject to sale at Helena, containing seven (7) acres and sixty-hundredths of an acre of land, more or less, and, according to the returns on file in the General Land Office, bounded, described, and platted as follows. with magnetic variation at as hereinafter stated: Beginning at the southwest corner of the claim, an iron bar one and one-fourth (1¼) of an inch in diameter driven in the ground at the intersection of Quartz and Main streets, in the town of Butte, from which the southeast corner of J. H. Leffler's house bears, with magnetic variations at twenty (20) degrees east, north forty-five (45) degrees fifteen (15) minutes west at the distance of sixty-nine (69) feet, the northeast corner of W. Park's house bears south fifty-four (54) degrees forty-five (45) minutes west at the distance of thirty-nine feet, the northwest corner of a carpenter's shop bears south fifty-nine (59) degrees fifteen minutes east at the distance of sixty (60) feet, and the southwest corner of a house bears north forty-five (45) degrees fifteen (15) minutes east at the distance of eighty-seven (87) feet; thence from said corner No. 1 north six (6) degrees west two hundred and seventy-two (272) feet to a shaft, three hundred and forty

(340) feet to a corner No. 2, a post four (4) inches square in mound of stone marked "M. C. 56, 2," from which corner No. 2 of lot No. 43 patented to Charles S. Warren with his claim upon the Woolman lode, bears, with magnetic variation at eighteen (18) degrees forty-five minutes east, north twenty (20) degrees forty-five minutes east at the distance of three hundred and eighty-three (383) feet; the southeast corner of lot No. 39, patented to William A. Clark with his claim upon the original lode, bears north fifty-five (55) degrees thirty (30) minutes east at the distance of four hundred and sixteen (416) feet; a shaft bears south eighty (80) degrees east at the distance of three hundred and thirty-one (331) feet, and a shaft bears south seventy-nine (79) degrees thirty (30) minutes east at the distance of four hundred and six (406) feet; thence from said corner No. 2 south eighty-seven (87) degrees forty-five (45) minutes east forty-six (46) feet to east side of Main street, one hundred and ten (110) feet to road, four hundred and ninety-four (494) feet to the west side of Wyoming street, six hundred (600) feet to small gulch, seven hundred and ten (710) feet to Town gulch, one thousand and thirty-five (1,035) feet to east boundary of Butte town site, eleven hundred and forty-two (1,142) feet to corner No. 3, a post four (4) inches square in mound of stone marked "M. C. 65, 3," from which the corner common to section seven (7), twelve (12), thirteen (13), and eighteen (18), in township three (3) north of range eight (8) west of the principal meridian, bears, with magnetic variation at nineteen (19) degrees forty-five (45) minutes east, north forty-one (41) degrees fifteen minutes east at the distance of eleven hundred and eighty-six (1,186) feet; thence from said corner No. 3 south seventy-seven degrees thirty minutes east three hundred and eighteen (318) feet to corner No. 4, a post four (4) inches square

in mound of stone marked "M. C. 65, 4"; thence with magnetic variation at nineteen (19) degrees thirty (30) minutes east, south six (6) degrees east fifty-four (54) feet to corner No. 5, a post four (4) inches square in mound of stone marked "M. C. 65, 5," from which the southwest corner of lot No. 45, A, patented to Dennis Leary et al., with their claim upon the Parrott lode, bears north fifty-one (51) degrees east at the distance of three hundred and thirty-five (335) feet, and corner No. 3 of lot No. 63, made for the claim of Andrew J. Davis upon the Baltic lode, bears south thirty-nine (39) degrees fifteen (15) minutes east at the distance of four hundred and twenty-five (425) feet; thence from said corner No. 5 south eighty (80) degrees forty-five (45) minutes west four hundred and thirty-three feet to east boundary of Butte town site, five hundred and ninety-seven (597) feet to corner No. 6, a post four inches square in mound of stone marked "M. C. 65, 6"; thence with magnetic variation of nineteen (19) degrees forty-five (45) minutes east, south eighty-five (85) degrees west ten feet to road, two hundred and seventy (270) feet to east side of Wyoming street and east end of Quartz street, eight hundred and thirty-four (834) feet to the place of beginning, containing seven acres and sixty-hundredths (60/100) of an acre of land, more or less, and embracing fourteen hundred and sixty (1,460) linear feet on the said Gold Hill lode, as represented by yellow shading in the following plat.

(The plat by agreement is here omitted.)

Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Heinrich C. Wiebbold and to his heirs and assigns the said mining premises hereinbefore described as lot No. 65,

embracing a portion of township three (3) north of range eight (8) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents and of fourteen hundred and sixty (1,460) linear feet in the said Gold Hill vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining and also all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; Provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits, excepting and excluding, however, from these presents all town property rights upon the surface, and there are expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same: And provided, further, that nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of

whatsoever nature thereunto belonging, unto said Heinrich C. Weibbold and to his heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as Lot No. 65, with fourteen hundred and sixty (1,460) linear feet of the Gold Hill, through its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Montana may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the City of Washington, the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty,—Independence of the United States the one hundred and fourth.

by the President:

R. B. HAYES.

By WM. H. COOK, *Secretary.*

S. W. CLARK,

Recorder of Gen. Land Office.

* * * * * * * *

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten pages, numbered from one to six, inclusive, contain a true copy of an extract from the transcript of the record in the case of James A. Talbott, Special Adm'r of Andrew J. Davis, Appellant, vs. Henry Weibbold, No. 219, October Term, 1890, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 19th day of November, A. D. 1912.

JAMES H. MCKENNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

IN THE

Supreme Court of the United States

No. ———

EDMUND BURKE, *Appellant*,

vs.

THE SOUTHERN PACIFIC RAILROAD AND KERN TRADING AND OIL COMPANY, *Appellees*.

Technical Brief by Professor Charles F. Mabery Setting Forth the Reasons that Petroleum Is Within the Meaning of the Term "Mineral" as It Was Used in the Acts of Congress Reserving Mineral Land from the Railroad Grant Involved in this Case. An Answer to the Fifth Question Certified.

At the date of the Acts of Congress referred to above, July 27th, 1866, the petroleum industry in the United States was well advanced and oil territory was widely exploited. In California extended investigations had been made, especially by Professor S. F. Peckham and Professor J. D. Whitney, State Geologist of California, the results of which were widely circulated by publication,

especially in Professor Whitney's report to the California Geological Survey. The California Petroleum Company was then exploiting oil territory with the assistance of Professor Peckham as chemist. At the date of the said Acts of Congress, therefore, the Members of Congress could not have been uninformed of the presence of petroleum in the lands granted in the said Acts, as the investigations above referred to embraced some of the lands granted by said Acts of Congress.

It must, therefore, be assumed that petroleum was included as a mineral in the reservation of mineral lands. Again, since oil territory had previously been located, and in Section 3 of said Act all mineral lands were excluded, but with an option on an equivalent area of agricultural land, petroleum land must have been included in said Acts either as mineral land or as agricultural land. Certainly, the framers of said Act did not intend to assign a title to petroleum territory as agricultural land; therefore, petroleum territory must have been included in the reservation of mineral land.

Section 2 of the Pickett Bill reserves mineral land for exploitation and purchase, reserving coal, oil, gas and phosphates, plainly classifying these products as minerals. There seems to be a good foundation, therefore, for the belief that petroleum was included within the meaning of the term "mineral" by the framers of said Acts.

Since the evident intent to include petroleum as a mineral in said Acts must indicate a general usage at that time of such meaning, it is pertinent to ascertain from the contemporary literature of petroleum the basis for including petroleum as a mineral deposit.

The general definition of a mineral as any constituent of the earth's crust was then accepted as it has been since. A distinction based on inorganic and organic composition

cannot be applied, for such mineral substances as coal—anthracite, bituminous,—Albertite, pitches, asphalts and mineral tars, all of organic origin, have as much an organic composition as petroleum.

Referring to the early literature of petroleum it is plainly evident that petroleum was classified together with the substances referred to above, especially because they have a common origin, notably the pitches and asphalts. For example, in the near vicinity of the great Pitch Lake at La Brea, Trinidad, are large producing oil wells.

In describing the deposit of Albert coal (Albertite) in New Brunswick in 1865 (American Journal of Science and Art), the eminent geologist, C. H. Hitchcock, mentioned cavities in the coal filled with petroleum, and he ascribed to the Albertite and oil a common origin. He stated that "the carbonaceous veins of Albert coal, Canadian asphalt, and liquid petroleum have many characteristics of metallic veins."

In the early days of the California petroleum industry S. F. Peckham spent much time in exploiting that oil territory, and in his comprehensive Government Report of Petroleum in the United States in 1881 he devoted much space to the description of the mineral products,—asphalt, maltha and petroleum. He alluded to the operation of producing petroleum as oil mining. Peckham classified asphalts, mineral pitches, maltha and petroleum as varieties of Bitumen as a generic term for those mineral deposits. He described the flow of petroleum from tar springs. He frequently alluded in that report to petroleum as included in mineral deposits.

In an address at the Franklin Institute, Philadelphia, in 1895, on the subject, "What Is Bitumen?" published in the proceedings of the Institute, Professor Peckham plainly defines petroleum as a mineral, as follows:

> "It therefore seems to me desirable that the word bitumen should be once more, and clearly, defined, as the generic name of that large class of substances occurring in nature as minerals and consisting chiefly of mixtures of compound of carbon and hydrogen, with nitrogen, sulphur and oxygen as more rare constituents. Under this genus should be ranged, as species and sub-species—all of the natural combustible gases, naphthas, petroleum, malthas and asphaltums."

In the same address he said further:

> "I think that the Trinidad pitch, so-called, is properly to be considered a mineral species."

In an address by Professor S. P. Sadtler before the Franklin Institute in 1895, published in the proceedings of the Institute, occurs the following statement:

> "The word bitumen in mineralogy is applied to hydro-carbon mixtures of mineral occurrence, whether solid, liquid or gaseous. With this understanding of the nature of bitumen, we can adopt the very concise classification of Professor S. F. Peckham, who published, in 1885, the 'Special Report on Petroleum' for the Tenth Census. It divides bitumen into:
> "Solid: Asphaltum. Fluid: Petroleum. Volatile: Naphtha. Gaseous: Natural gas—of burning springs"

In his annual address as president of the Geological Society of America in 1898 the eminent geologist Dr. Edward Orton stated:

> "The crust of the earth contains but few mineral productions that awaken such widespread interest as the bituminous series. The search for oil and gas is attended with much of the excitement that goes with the search for the precious metals."

The early authorities on the geological occurrence and formation of petroleum,—Dr. T. Sterry Hunt, Dr. Winchell, Professor J. D. Whitney and Dr. Edward Orton,—all agree in ascribing a common origin,—shellfish,—in the formation of limestone and petroleum, the shells forming the limestone and the organic bodies petroleum. This relation was clearly demonstrated in the Trenton limestone and in the Corniferous limestone, both of which carry enormous stores of petroleum.

With reference to the specific character of the petroleum occurring in California territory, it should be borne in mind that petroleum from whatever source, as, for example, California, Pennsylvania, Russia or Texas, must be understood as having the same general composition, differing only in the proportions of the various constituents,—California petroleum contains less of the lighter products, such as gasoline and burning oil, while Pennsylvania petroleum contains less of the heavier constituents that form the main body of California petroleum. But petroleum from any oil territory contains constituents to be found in petroleum from any other oil territory. It may further be said of California petroleum that it approaches more nearly the qualities of the mineral asphalts. In fact much of it has been defined as maltha, an intermediary natural product between the lighter petroleums and the mineral asphalts.

In view of the composition of California petroleum and the agreement of scientific authority with commercial use in defining it as a mineral product, at the time of the passage of said Acts of Congress and subsequently, we are of the opinion that in the said Acts of Congress petroleum or mineral oil was within the meaning of the term "mineral" in the reservation of mineral land from the railroad land grants.

EDMUND BURKE,
Attorney in pro. per.